IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE CIVIL JURISDICTION

WRIT PETITION NO.4527 OF 2005

Mrs.Vijaya S. Aras)).. Petitioner

Versus

Padmakar K. Sahani and others)).. Respondents

Mr.C.J. Sawant, Senior Counsel, with Mr.V.C.Ghosalkar for the Petitioner.

Mr.G.S. Godbole for Respondent Nos.1, 2, 3 and 5.

CORAM: SMT.NISHITA MHATRE, J.

DATED: 6TH SEPTEMBER 2005

P.C. :

. This Petition challenges the concurrent findings of fact arrived at by the Courts below in respect of ejectment of the tenant on the ground of Section 13(1)(k) of the Bombay Rents, Hotel and Lodging House Rates (Control) Act, 1947 i.e. non-user of the suit premises for a period of six months preceding the institution of the Suit, without reasonable cause. Both the Courts have found that the Petitioner, who is the daughter of the original tenant, is not in use of the suit premises. After the original tenant died, his son Vasant was recognised as a tenant by the landlord. The daughter of the original tenant i.e., the Petitioner in the present Petition claims that she would visit the

suit premises, daily, to cook for her brother who was unmarried. She has also contended that she was in use of the suit premises since her children were going to a school near the suit premises although she lived in her matrimonial home at Worli.

2. The submission of the learned Counsel appearing for the Petitioner is that the pleadings in the Plaint do not support the evidence and the findings of the Courts below. It is submitted that the pleadings must be specific and in terms of Section 13(1)(k) only. No other phraseology can be used in order to plead that the premises were not in use for six months preceding the institution of the Suit. Reliance is placed on the judgments of the learned Single Judge of this Court in *Shantanu Baburao Palaskhedkar* vs. *Vinayak Mahadeo Sainkar*, **2002 (1) Mh.L.J. 262**, *Ashok Vithal Chavan and others* vs. *Baburao Sakharam Bhagat*, **2002 (4) ALL MR 217** and *Dulanbi Mirasaheb Belgaonkar* vs. *Annappa Kurka Devadiga*, **2002 (I) Mh.L.J. 507**.

3. Paragraph 6 of the Plaint reads as under :-

> "6. The Plaintiffs say that the suit premises have been kept locked and unused for a period exceeding six months on the date of filing of the suit. The Plaintiffs further say that the Defendants, have after coming into operation of Bombay Act LVII of 1947 acquired suitable other residence."

4. Paragraph 10 of the Plaint reads as under :-

> "10. The Plaintiffs, therefore, seek to recover from the Defendants quiet, vacant and peaceful possession of the suit premises being Block No.6 in the Plaintiffs property bearing municipal street No.21-B, Gamdevi Road, Gamdevi, Bombay-400 007 upon the grounds that the Defendants are not ready and willing to pay and observe and perform the terms and conditions of tenancy and have failed and neglected to pay the rent as also the permitted increases and water charges in spite of demand contained in Plaintiff's Advocate's notice dated 8.11.79 and that the suit premises have not been used for the purpose for which they have been let for a period exceeding six months on the date of the filing of the suit and that the Defendants hae after coming into operation of Bombay Act LVII of 1947 acquired suitable other residence."

5. In my view, the pleadings contained in paragraphs 6 and 10 do make out a case under section 13(1)(k). The phraseology "suit premises have not been used ..... for a period exceeding six months on the date of the filing of the Suit" as used in the aforesaid paras would mean that the suit premises were not in use for a period of six months prior to date on which the Suit was instituted. Therefore, the submission of the learned Counsel for the Petitioner that the pleadings in the plaint are not in consonance with the terminology used in the Section, is a matter of semantics and without merit. The pleadings contained in the plaint in

no uncertain terms indicate the case of the Respondent is inter alia founded on the provisions of section 13(1)(k).

6. In the case of *Ashok Vithal Chavan and others* (supra), a learned Single Judge of this Court has held by placing reliance on the decision in the case of *C.R. Shaikh v/s. Leelabai D.Rohida & Anr.*, **1981 Mh.L.J. 437** held that if there is no pleading in respect of the ground of non-user under section 13(1)(k) of the Bombay Rent Act, then it could not be said that the plaintiff had made out a cause of action against the tenant to invoke that ground. The learned Single Judge has observed thus:

> 7. .... Accordingly, having regard to the admitted position from the record that the Petitioners did not plead nor adduce any evidence to even suggest that the demised premises were kept locked for more than 6 months by the Respondent-tenant "without any reasonable cause" as has been observed by this Court in the above said decision, no cause of action would arise to invoke that ground. No doubt, the onus on the landlord with regard to the factum of non user of the suit premises "without reasonable cause" is very light, but nonetheless the landlord has to allege that fact only when the provisions of Section 13(1)(k) can be said to have attracted. Suffice it to point out that no pleading nor any evidence in that behalf is forthcoming from the landlords and, therefore, no fault can be found with the Courts below in rejecting the decree on that ground.

Similarly, in the case of *Shantanu Baburao Palaskhedkar*

(supra), it was held that section 13(1)(k) of the Bombay Rent Act is attracted only when the premises have not been used, without reasonable excuse, for the purposes for which they were let for a continuous period of six months, immediately preceding the date of the suit. In the facts of that case, it was held that the nature of the user had not been changed by the Petitioner i.e., the tenant and therefore, the provisions of section 13(1)(k) had no application. There was no evidence on record that the suit premises were kept locked and unused continuously for a period of six months preceding the date of institution of the suit.

7. In the case of *Dulanbi Mirasaheb Belgaonkar* (supra), it has been held that there was no assertion of the facts in that case that the premises had not been used without reasonable cause for the purpose for which they were let for a continuous period of six months immediately preceding the date of the suit which is the requirement for attracting section 13(1)(k). Such an issue was not framed by the trial Court. However, the appellate Court recorded a finding that the tenant was staying elsewhere but the decree was not passed on the ground of section 13(1)(k). The learned Single Judge has observed that merely because a landlord succeeds in establishing that the tenant is staying at some other place that was not sufficient to attract section

13(1)(k). This section is applicable only when the landlord succeeds in establishing the fact that the tenant was not using the suit premises continuously for a period of more than six months preceding the date of institution of the suit. Such a plea was lacking in the plaint and, therefore, the learned Judge has held that the decree not having been passed on the ground of section 13(1)(k) cannot be validated.

8. All these judgments in my view, do not take the Petitioner's case any further. It was found in all those cases that there was no pleading in the plaint to attract the provisions of section 13(1)(k). In the present case, it can hardly be said that the landlord has not pleaded his case that the suit premises have not been in use for a period of six months preceding the institution of the suit. In my view, the pleadings in the plaint amply indicate that such a case was made out. Both the Courts below have found on the basis of the evidence on record that the ground under section 13(1)(k) has been established. There is no infirmity in the findings of both the Courts below. Petition rejected.

9. Parties agree that, by consent, operation of this order is stayed for ten weeks from today on the usual terms.